ISSUE #2

PERSPECTIVES

A PUBLICATION FOR THE MEMBERS OF THE ASSOCIATION OF FRATERNITY/SORORITY ADVISORS

REDEFINING FRATERNITY:

EXAMINING TITLE IX, THE FIRST AMENDMENT & PRIVATE FRATERNAL ORGANIZATIONS

| Nathan Arrowsmith & Stevie Tran

NEW LIABILITY FOR SEXUAL-BASED HAZING

| Matthew Patrick Shaw, J.D., Ed.D.

| Gregory S. Parks, J.D., Ph.D.

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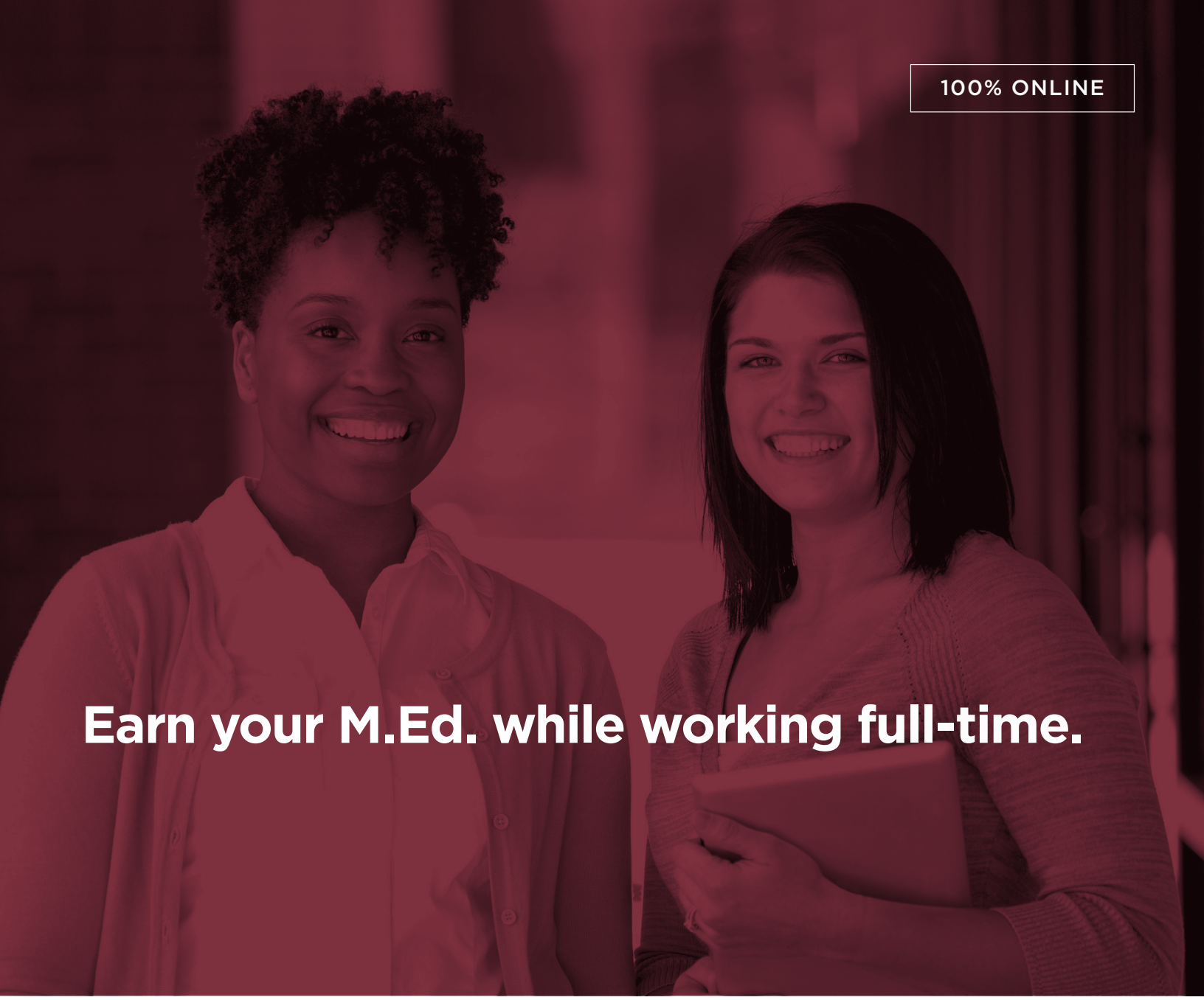

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LETTER FROM THE PRESIDENT

The *Perspectives* you are about to read relates to issues of law in higher education. Realistically in my day-to-day job, the extremely large textbook from my law of higher education class is not always the most useful tool, but I do call upon my university's legal counsel. When I interviewed for my current professional position and was asked what campus partners I have collaborated with in the past, legal counsel was one area I named. I find the professionals who work in that office to be quite valuable in providing advice. However, I also value that they rely on my expertise as a student affairs professional in the functional area of sorority and fraternity life. And we, as student affairs practioners, can be empowered to make the best decisions we know how when doing our work.

A core competency for fraternity and sorority professionals is awareness of legal issues, particularly more recent trends. For example, do you know if your state has hazing laws? And, if so, is hazing a felony or misdemeanor? Does your state have mandates for education? For example, NY State has an "Enough is Enough" law requiring sexual violence prevention education for leaders of student organizations including sororities and fraternities. Many inter/national organizations have worked through adopting policies allowing students who identify as a man or a woman to join a sorority or fraternity, and this was done with guidance from their own legal counsel. And another area where we may see legal issues arise is judicial processes on campus and via inter/national organizations. Recently, we have seen a large debate about freedom of speech on campuses and what can be punishable and what cannot as well as alternatives for these situations, such as restorative justice approaches in the absence of campus code violations.

This edition will help us explore some of the current legal trends in higher education with a lens to inform our best work. Conversations about legal issues and cases nationally are a good thing to insert into staff meetings or trainings or shared readings. Participate in offerings that likely already occur on campus or in your community regarding these topics as an opportunity to learn. Many practitioners attend the Fraternal Law conference sponsored annually by Manley Burke in Cincinnati. As you read this copy of Perspectives, think critically about how you best incorporate legal issues competence and resources into your professional development plan.

Kara Miller McCarty, President

LETTER FROM THE **EDITORS**

Grassroots initiatives. Zoning laws. First Amendment rights. Town-gown relations. Lobbying on Capitol Hill. Housing regulations. Educational law. Local, state, and federal legislation. Evolving definitions of membership. Lawsuits and insurance claims. Legal implications.

For many, these legal issues are not likely to top the list of reasons for pursuing a career within higher education and/or fraternity/sorority life. Instead, many of us likely began our careers with a focus on facilitating student development, challenging systemic barriers to equity and success, continuing or leaving a legacy, building community, advocating for the importance of education, giving back to individual organizations, or helping move the collective fraternity/sorority experience forward.

While these driving forces are invaluable, as they are the initial motivators that push us to pursue this meaningful work and persist when challenges arise, they are simply not enough. It is no longer – nor ever has been – acceptable to work in fraternity/sorority life without knowledge, focus, awareness, and informed practice on the areas we mentioned first … the issues that aren't as rewarding or easy to understand … the areas that many of us didn't enter this field for.

So let us say it again.

Grassroots initiatives. Zoning laws. First Amendment rights. Town-gown relations. Lobbying on Capitol Hill. Housing regulations. Educational law. Local, state, and federal legislation. Evolving definitions of membership. Lawsuits and insurance claims. Legal implications.

Although the full extent of navigating these areas is rarely listed on a position description, interest, engagement, and competence in legal issues such as these is not only vital to one's professional success within this field, but more importantly, to the sustainability of the fraternity/sorority experience.

This edition examines a variety of legal issues the fraternity/sorority industry faces and an array of opinions on those varying issues. In the following pages, you will find a discussion on the benefits of the single-sex fraternity and sorority experience. You will read about the need to shift how we think about hazing liability. The notion that fraternal organizations are protected under Title IX will be challenged and reframed. A model for effective self-governance within campus conduct procedures will be provided. The field will be charged with proactively educating itself about legal matters within higher education. Attention will be drawn to the fact that we all have legal resources available – no matter the workplace – but often fail to cultivate the potential collaborations and partnerships that exist within those resources. In sum, the following pages place some of the most pressing issues the fraternity/sorority industry faces – the legal issues – at the forefront of our minds.

Read the articles that follow, share this issue with colleagues, stay (or become) informed, constantly work to increase competence, and use the information and insights provided to inform your practice, thoughts, and professional development. While the legal issues covered in the following pages might not be what initially drove you to work in this field, they must be at the core of your purpose moving forward … the fraternity/sorority experience depends on it.

Emilee Danielson-Burke & Noah Borton
Co-Editors

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Brian C. Warren Jr. @SigEpCEO - 21 May 2018
Thank you @AFA1976 for the opportunity to discuss how @officialsigep has embraced the #NewNormal.

Together, I hope we can change things. I hope we can save lives while providing an experience more relevant to our values and the mission of higher education.

Michelle Guobadia @MGspeaksUP - 22 May 2018
Check out this article about the @AFA1976 #GraduateTrainingTrack Endowed by Me! YAY!!! #SupportFutureProfessionals!

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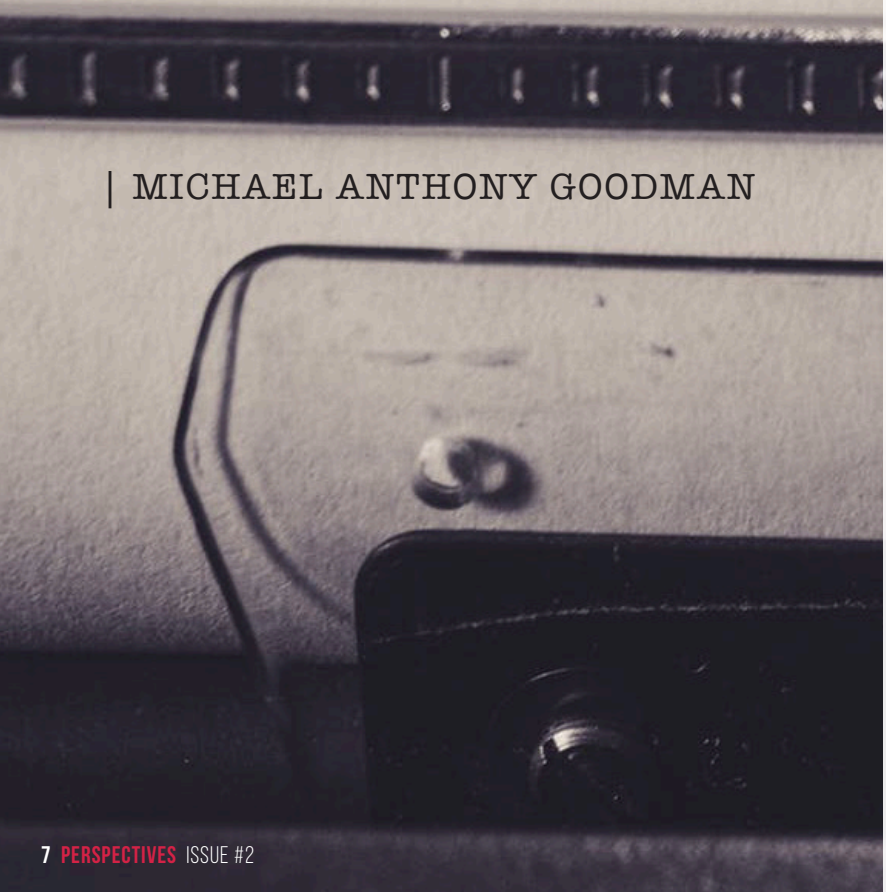
PROFESSIONAL PREPARATION & LEGAL MATTERS

IN HIGHER EDUCATION

| MICHAEL ANTHONY GOODMAN



In 2012, I took a Higher Education Law course as part of a requirement for my master's degree. This particular course was the hardest course I took in my program, and where I learned the most during my two years in graduate school. This course taught me to ask questions about how law and student affairs intersect and in what ways my various jobs in student affairs need to be mindful of legal implications. In my first job as a campus-based professional, I observed many students' transition into their role as a chapter or council officer with concern about possible legal ramifications for their members' behavior. Many would tell me, "I don't want to get sued." While my initial answer was, "Then don't do bad things," I knew it was much more complicated for some chapters.

What does it mean to face the possibility of being sued in fraternity/sorority life? A simple Google search of "fraternity and sorority members sued" validates the possibility. However, an exploration of previous cases and incidents are not enough to illuminate this reality for students and staff. Now several years after finishing my master's degree, I have a unique doctoral assistantship in a university legal aid clinic where we assist students in both legal situations and incidents involving the university conduct system. It has been in this role where I have been able to see the reach that legal matters have across campus, and especially student affairs. As a result, student affairs divisions (namely fraternity/sorority life) and inter/national fraternity/sorority organizations should connect to this work in a myriad of ways.

When is the last time you took inventory of your staff or team's knowledge of case law and current events related to fraternity/sorority life? What can you do as a staff or team to further unpack legal realities in this field? Collectively, there are ways in which student affairs programs and entities, organizations, and professionals can help foster a spirit of importance around the law and conversations about higher education and fraternity/sorority legal issues. The following are some ideas to center these types of conversations in your workplace and community:

DISCUSS LITIGATION IMPACTING THE FIELD.

Once a month, have your staff discuss a current piece of litigation impacting higher education. Engage all layers of this work – look at previous cases that have served as precedent, current cases involving all types of councils, and the intersections of different kinds of risk; these can include residence life, fraternities/sororities, hazing and alcohol, and sexual assault and the law. Additionally, look at more general legal issues in higher education, like affirmative action and admissions.

WHERE TO START?

- ***Furek v. University of Delaware*** (1991)
- ***Knoll v. Board of Regents of the University of Nebraska*** (1999)
- ***Quinn v. Sigma Rho Chapter*** (1987)
- ***Fisher v. University of Texas*** (2015)

ENGAGE YOUR INSTITUTION OR ORGANIZATION'S LEGAL COUNSEL.

Invite your institution or organization's legal counsel to your next staff meeting or as a professional development opportunity. Engage with them around issues impacting your work and community, and discuss what ways you can be educating students in this area. Additionally, you can invite members of the legal counsel to a fraternity/sorority retreat or class your students are taking — foster a space where students can also ask them questions that might be impacting their role and experience.

TALK ABOUT PROFESSIONAL LIABILITY INSURANCE.

As part of my doctoral studies, I took a class in which we engaged in multiple conversations about professional liability insurance and whether or not professionals, at various levels, should obtain this type of coverage. It is worth engaging in this conversation with your supervisor or staff — in what ways do you understand the institution's coverage, and how far does that coverage protect you. Also consider opening this opportunity to student leaders related to their coverage needs, or what responsibilities exist for them in their specific roles.

PRIORITIZE PROFESSIONAL DEVELOPMENT.

Send someone to a legal/law-based higher education or student affairs conference. If anything, there is great value in gaining professional preparation and baseline understanding of legal practices in this field. If someone on your staff does not have experience in reviewing legal situations in their academic or professional career, find a way for them to access the information in a professional setting. There are many conferences in higher education that cover these topics: the National Conference on Law and Higher Education (Stetson University), the Higher Education Law Conference (University of North Texas), and the Legal Issues in Higher Education Conference (University of Vermont) are just a few. If you cannot attend these, in addition to student affairs or fraternity/sorority-based conferences, intentionally select someone from your staff to attend legal/law-based workshops at ACPA, AFA, ASCA, and NASPA, and then invite them to present back to the staff after the conference.

BUILD A RELATIONSHIP WITH YOUR CAMPUS LEGAL AID OFFICE.

When I started my doctoral degree program, I took a graduate assistantship in the university's Undergraduate Student Legal Aid Office, where I advise students, working with those going through the university's conduct process. Up to this point, I never really understood the intersections of a legal aid office within a division of student affairs. After working in this capacity for almost two years, I see so much benefit in a partnership between fraternity/sorority life and legal aid. To do a quick assessment, find out if your institution or community has a free (or paid for by student fees) legal aid office. If so, connect with them, build a relationship with the staff, and find ways you can use them as a referral to students. Two important things to remember — first, you are not an attorney, and if/when students need legal advice, direct them to someone who is qualified to give that advice. Second, legal assistance is often very expensive — a community's or institution's legal aid office can drastically minimize the amount of money a student (or student group) might have to spend on legal advice or services.

It is no secret that legal matters are plaguing higher education. While I believe student affairs professional

preparation programs should be starting points for disseminating baseline knowledge, I know not all programs teach about legal matters — further, not all higher education and student affairs professionals are trained in the higher education/student affairs context. In fraternity/sorority life, there is a great chance of working alongside student behavior that is unpredictable and at a higher risk. These suggestions are not solely for graduate students or new professionals. All individuals who work with fraternities/sororities, and in various capacities, can benefit from this type of engagement, especially as higher education, student affairs, and fraternity/sorority life all continue to evolve.

Whereas chapter leaders might rely on an attorney to help address the legal implications for removing a member from their residence, a student affairs professional can work with the chapter on how to support the community that might be impacted by that loss. Whereas an attorney can assist a chapter in dealing with a sound citation issued by city police, a student affairs professional can advise on how to mend city-chapter relationships in moving forward. Whereas an attorney can advise on any legal issues involving a member's alcohol or drug citation, a student affairs professional can assist the chapter in navigating the university conduct process, as well as resources to help the chapter member during that time. Ultimately, there can be great benefits between a collaboration of a legal-mindset and student affairs-mindset in how to effectively serve students.

Working for an attorney for the past two years has taught me multiple areas where I, as a student affairs professional, can prioritize and further help students in their collegiate journey. The fear that many council and chapter leaders face upon taking their positions is a narrative I continue to replay when working with students and one that holds me accountable to the vulnerable state that many must endure when seeking any kind of legal advice. In short, one does not have to be an attorney to understand and value legal matters related to fraternity/sorority life. Here's to bridging that gap.

"Ultimately, there can be great benefits between a collaboration of a legal-mindset and student affairs-mindset in how to effectively serve students."

AUTHOR

Michael Anthony Goodman
University of Maryland

Michael Anthony Goodman is a Ph.D. student at the University of Maryland, studying Higher Education, Student Affairs, and International Education Policy. He is a former fraternity/sorority advisor, and spends time volunteering and facilitating for fraternities/sororities. Michael's research interests include issues around fraternity/sorority involvement and advising, student government, and LGBTQ+ identities in student affairs.

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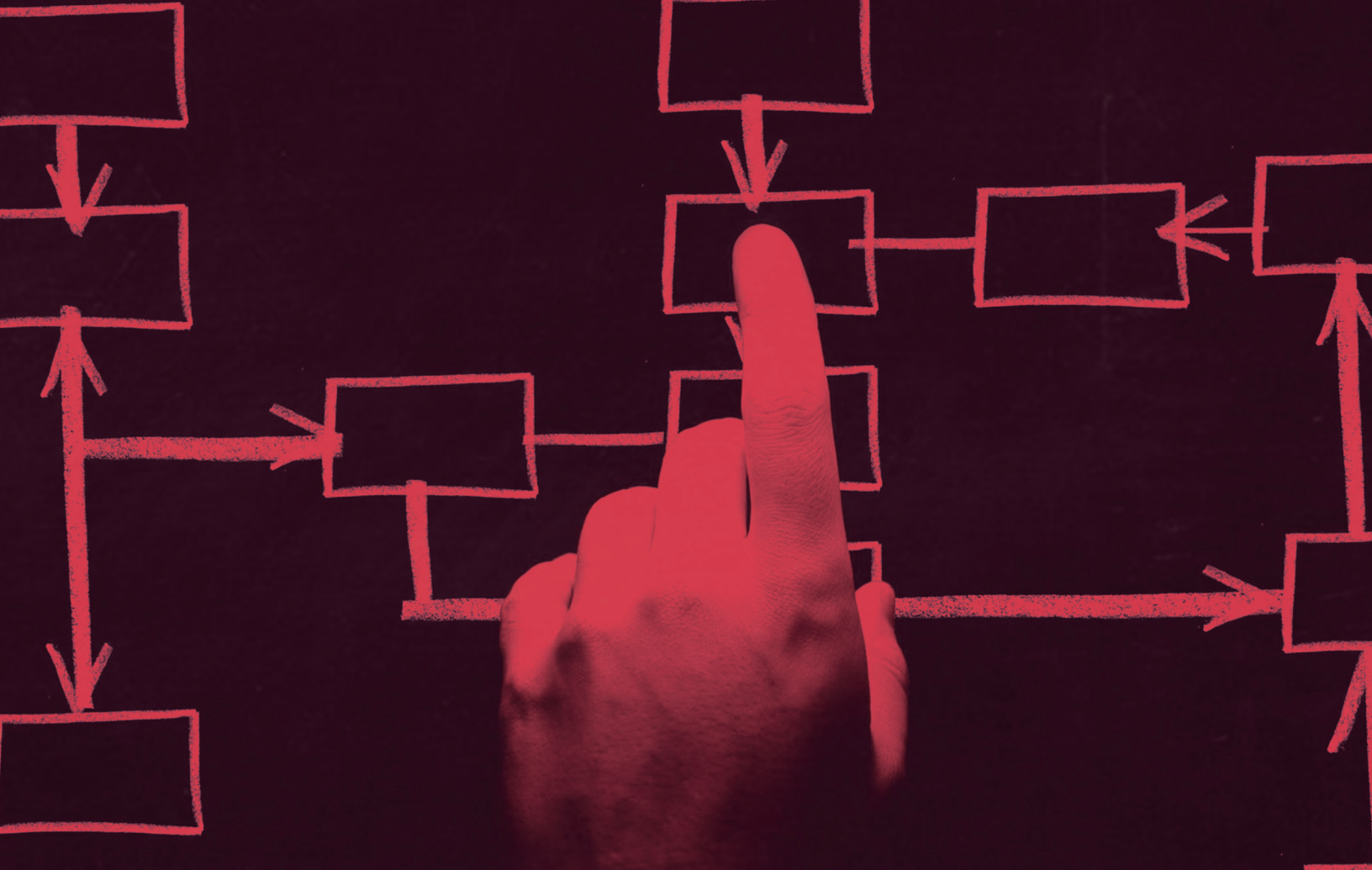

CREATING A CONDUCT PROCESS

KATE CARNELL

Starting an all fraternity/sorority conduct process is no easy feat. The concept of self-governance is as old as the fraternal movement itself; one that is at the heart of the fraternity experience (McCreary, blog post, May 2, 2014). So, after many years of failing to launch a way in which the students could successfully hold one another accountable under the helpful eye of administrators, we've finally landed on a way honoring the self-governance of our chapters, while at the same time recognizing a faculty governance structure that affects most, if not all, decisions made within the life of the campus.

Our university is home to approximately 2,100 undergraduates of which just over 500 are members of one of the eight fraternal organizations on campus. The university is private and operates under what is commonly referred to as a shared governance structure, a "delicate balance between faculty and staff participation in the planning and decision-making processes" (Olson, 2009). That includes decision-making by a variety of faculty committees, including a student conduct board hearing and the student conduct hearing appeals processes. The general student conduct board for the university is comprised of a pool of six undergraduate students, six elected faculty (voted upon by the faculty's senate), and a designee of the Office of the Vice President of Student Affairs and Dean of Students, who is vested with authority over student conduct by the university's president (Student Handbook, 2017). In our case, the designee is the director of student conduct. The director is responsible for administering the student conduct hearing panel, including many of the administrative responsibilities and training that comes with convening a hearing panel. When a hearing panel is called, it consists of two student and two faculty representatives from that trained pool of individuals and the director of student conduct (Student Handbook, 2017).

Using our general student conduct process as a framework, we assembled a working group to look at how a process of addressing conduct and risk management issues and violations could be applied to the fraternity/sorority community. The working group included the IFC and Panhellenic presidents, the IFC and Panhellenic vice presidents responsible for risk management and administration, the IFC and Panhellenic advisor, and the director of student conduct, who was a wealth of information in terms of explaining and clarifying procedures. For an entire year, the working group looked at how the individual chapters addressed conduct; how previous iterations of the conduct process addressed issues; what issues we were most likely to adjudicate as a result of hosting an all-fraternity and all-sorority board; sample ideas for conduct procedures and processes from similar (and some not so similar) fraternity/sorority communities; and how the board should be comprised.

Our final iteration includes the following suggestions for your consideration, if your community is looking to begin or to revise a fraternity/sorority life specific conduct process.

1. **When looking for examples, campus culture matters.** There are some amazing examples of the conduct process done well, but exact replication from one campus to the next will likely not be successful. Consider contacting peer and aspirant fraternity/sorority communities with similar institutional demographics. It is instrumental to honor the specific context of your campus and chapters.

2. **Include faculty who are knowledgeable or well-versed in fraternity/sorority life.** Including faculty who are not affiliated is a way to build advocacy for the fraternal experience on campus, but also pay special attention to those who were active members as undergraduates. We are fortunate to have several fraternity and sorority alumni, both from our university and from others, that know and "get" the fraternity experience to serve in this role. While it's certainly not a requirement, and not an available option to all, it's a starting point that can make the students involved in the conduct process feel as though their experience will be understood, not dismissed.

3. **Be thoughtful about how to train the undergraduate students and faculty members.** We were intentional in training the students and faculty members of the board together, so they could not only get to know one another, but also so all involved heard the same information. Utilize the students from the governing councils responsible for this process in facilitating training material, especially regarding confidentiality. There's something very powerful in having peer education around this topic.

4. **Consider the policies before deciding on how to structure the board.** There are very specific instances where who is part of a hearing is important to keep in mind. One is addressing infractions by NPC sororities. To properly follow the NPC judicial procedures, we established a procedure utilizing the sorority members and faculty who are representatives to the fraternity and sorority conduct board if issues go beyond that of mediation. Our procedures address violations of NPC Unanimous Agreements, guidelines, and recruitment infractions, following the process and procedures as outlined in the current year Manual of Information (NPC, 2018).

5. **Consider the experience students bring to the conduct board.** In our version, it was important that fraternity and sorority members had been active chapter members for a minimum of one year, including their new member semester. We believed this provided individuals enough time to experience fraternity or sorority life to make stronger, more educated decisions.

6. **Assess after each incident.** Each time a conduct process occurs, take a look at the entire process from start to finish. See if the needs of all parties were met and ensure the process was fair and as objective as possible. This can be done by survey, observation, and focus group of all involved parties.

When enacted in tandem with educational risk management programming, proper training, and the work of the organizations' inter/national offices, a fraternity/sorority conduct process can be a powerful and helpful educational tool. It is our hope this process continues to enhance the learning laboratory that is the undergraduate fraternal experience.

> "There are some amazing examples of the conduct process done well, but exact replication from one campus to the next is likely not to be successful."

AUTHOR

Kate Carnell
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Kate Carnell is the Director of Student Involvement & Leadership at the University of Mount Union, where she was initiated into Alpha Xi Delta as an undergraduate. She holds a master's degree from the University of Akron and a PhD in higher education administration from Kent State University. If you would like a copy of the referenced conduct procedure, please contact Kate via email, *carnelke@mountunion.edu*.

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University of Mount Union (2017). Student handbook. Alliance, OH.

As a society, the conversation around gender identity and expression has gained in prominence. College campuses are microcosms of the broader society, so it is not surprising that this topic is frequently discussed in the context of our work. As professionals, we get to see first-hand the struggles of students that are determining their identity, as well as how (or if) to communicate that with the broader community. We are often someone to listen and provide support when it seems that no one else does.

Most fraternities and sororities were founded as single-gender organizations, and the question of who can join can be particularly complex. The struggle between evolving societal norms and ideas of inclusivity can seem in conflict with staying true to values integral to the very purpose and existence of fraternal organizations. What is more important? Fostering inclusivity for all or recognizing that membership based on gender has intrinsic value? Encouraging groups to become more accepting or giving students the choice to self-select? Who can remain a member if gender expression or identity evolve? What if a member is gender nonconforming? Is siblinghood a more appropriate term than brotherhood or sisterhood?

In 1981 a policy was passed by AFA that is still in place today. While the language would not be considered current and the policy is not inclusive by today's standards, the general principles are still the same. The first paragraph of this 1981 resolution states: *The Association of Fraternity Advisors insists upon the retention of social fraternities and sororities as single-sex organizations. The strength and purpose of the fraternity and sorority experience lies in the opportunities it holds for personal development. One critical issue during this stage of life is developing identity. The single-sex fraternity or sorority fosters one's identity by providing an environment which can best address the different development needs of each sex. A complete fraternity or sorority program will also provide the opportunities for interaction with the opposite sex, thus responding to other developmental needs of college students.*

We do recognize this conversation will continue on campuses and within organizations. We need to make sure we are informed and engaging in those conversations to ensure they are productive, thoughtful, and respectful. I appreciate the authors for all editions of Perspectives, but particularly those that have contributed their thoughts on this sensitive topic.

Lynda Wiley, EdD

Executive Director, Association of Fraternity/Sorority Advisors

REDEFINING FRATERNITY: EXAMINING TITLE IX, THE FIRST AMENDMENT & PRIVATE FRATERNAL ORGANIZATIONS

NATHAN ARROWSMITH
& STEVIE TRAN

A common question that arises when discussing the topic of transgender inclusion in fraternities and sororities is whether or not admission of transgender members will jeopardize the organizations' "single-sex status" under Title IX. It is believed this question is based on the assumption that Title IX either authorizes fraternal organizations to discriminate on the basis of sex or requires fraternal organizations to be "single sex." After extensive research, however, it is evident **Title IX does neither.**[1] This raises the question: If Title IX does not empower fraternal organizations to discriminate on the basis of sex in membership decisions, then what does? The answer, we believe, is the First Amendment to the U.S. Constitution, which protects the right of citizens to enter into certain intimate and expressive associations. This article will introduce fraternal organizations to the associational rights protected by the First Amendment, enable them to analyze whether they meet the requirements for constitutional protection, and aim to inform the conversation regarding the purpose of fraternal organizations and their membership practices.

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Before diving into the relationship between fraternal organizations and the First Amendment, it is necessary to dispel the pervasive myths that Title IX confers upon fraternal organizations the right to discriminate on the basis of sex or requires fraternal organizations to remain "single-sex." To understand why this interpretation of Title IX is incorrect, one must first understand the history of Title IX.

In 1972, Indiana Senator Birch Bayh sponsored Title IX in response to the omission of sex as a category of prohibited discrimination under Title VI of the Civil Rights Act of 1964.[2] Title IX sought to "outlaw sex discrimination throughout our Nation's system of higher education."[3] The focus of Title IX was to ban sex-based admissions quotas to colleges and universities, inequalities in scholarship aid, and unequal access to course offerings and curriculum.[4] Title IX, therefore, applies to "any education program or activity" that receives federal financial assistance, stating no one shall, on the basis of sex: (1) be excluded from participation in an education program or activity; (2) be denied the benefits of an education program or activity; and (3) be subjected to discrimination under an education program or activity.[5]

The language that expressly mentions "social fraternities or social sororities" was not in the original legislation, but it was added in 1974 (the "1974 Amendment").[6] That year, the Department of Health, Education, and Welfare (the "Department") sought to examine how the mere recognition of fraternal organizations impacted an educational institution's eligibility to receive federal funds under Title IX.[7] In response, Senator Bayh sponsored an amendment to clarify the relationship - or lack thereof - between Title IX and fraternal organizations.[8] In a letter to Department Secretary Caspar Weinberger, Senator Bayh stated, "Fraternities and sororities have been a tradition in the country for over 200 years ... [and] must not be destroyed in misdirected effort to apply Title IX."[9]

In part, the 1974 Amendment states, "this section shall not apply to membership practices … of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education."[10] Visibly missing from the language of the 1974 Amendment is any mention of "single sex" or any express requirement applicable to fraternal organizations. Title IX, therefore, does not establish any right for fraternal organizations to discriminate on the basis of sex or any requirement to remain single sex. A letter from Secretary Weinberger entered into the Congressional Record confirms this: "[o]bligations under Title IX run to the recipient institution of higher education and not to a fraternal organization unless the organization itself received Federal financial assistance."[11]

The statutory text and the Congressional Record, therefore, demonstrate that Title IX does not apply to membership practices of fraternal organizations. Instead, Congress specifically designed Title IX to bind the educational institution, not a fraternal organization. Title IX's statutory scheme focuses solely on the educational institution, in that a college or university that receives federal funding must comply with Title IX throughout the institution and within its educational programs and activities. The 1974 Amendment, however, permits a college or university to recognize social fraternal organizations without risking the loss of federal funds. Title IX goes no further than that.

> **PRACTICAL POINT:** Common statements that reinforce an incorrect interpretation of Title IX include, "Title IX single-sex status," "our exemption under Title IX," and "our right to remain single sex under Title IX." Organizations should be firm that Title IX does not reach them or any other fraternal organization.

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[1] *See* 20 U.S.C. §§ 1681–1688 (2006).

[2] 120 Cong. Rec. 39,992 (1974); see 42 U.S.C. §§ 2000d–2000d-4 (2006).

[3] 120 Cong. Rec. at 39,992.

[4] 120 Cong. Rec. at 39,992.

[5] 20 U.S.C. §§ 1681(a).

[6] *See* 120 Cong. Rec. 39,991-94 (1974).

[7] *See id.* at 39,992.

[8] *Id.* at 39,991-92.

[9] *Id.* at 39,993.

[10] § 1681(a)(6).

[11] 120 Cong. Rec. at 39,994.

THE FIRST AMENDMENT

Title IX does not grant fraternal organizations any rights, nor does it place any requirements on fraternal organizations. What, then, gives fraternal organizations the right to discriminate in their membership decisions? The answer is the First Amendment to the U.S. Constitution.

Of course, nothing in the text of the First Amendment says explicitly that fraternal organizations may discriminate in their membership practices. However, the U.S. Supreme Court has recognized the First Amendment protects two categories of associational relationships: intimate associational relationships and expressive associational relationships. For each category, the Supreme Court developed a specific test used to determine whether an associational relationship is entitled to constitutional protection.

INTIMATE ASSOCIATION

With respect to intimate associational relationships, the Supreme Court notes, "because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."[12] To determine whether an associational relationship is entitled to constitutional protection, courts assess, "where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."[13] Only the most intimate relationships are entitled to constitutional protection. Factors considered by courts when determining if the relationship between an organization's members is sufficiently intimate include the organization's size, purpose, policies, level of selectivity, "congeniality" among members, and "other characteristics that may in a particular case be pertinent."[14]

The Supreme Court has applied this analysis to groups that discriminated on the basis of sex in membership selection. In *Roberts v. U.S. Jaycees*, the court analyzed whether the Jaycees, a young men's civic organization, could exclude women. The court concluded the Jaycees' chapters were "large and basically unselective groups," that "new members are routinely recruited and admitted with no inquiry into their backgrounds," and that "numerous nonmembers of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another."[15] Accordingly, the court held the Jaycees were not the type of intimate or "private" association entitled to constitutional protection.[16]

Shortly thereafter, the court examined membership practices of the Rotary Club.[17] In concluding the "relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection," the court found the following factors to be dispositive: there is "no upper limit" on the membership of any local club; clubs are instructed to "keep a flow of prospects coming" to make up for attrition and to "gradually enlarge the membership;" the local clubs' activities did not "suggest the kind of private or personal relationship" entitled to constitutional protection; many of the clubs' "central activities are carried on in the presence of strangers;" and the clubs "seek to keep their windows and doors open to the whole world," rather than "carrying on their activities in an atmosphere of privacy."[18]

How would fraternal organizations fare under the intimate association test articulated in *Roberts* and *Duarte*? The Supreme Court has never answered that question. However, two lower appellate courts have: the Third Circuit in *Pi Lambda Phi Fraternity v. University of Pittsburgh*[19] and the Second Circuit in *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of New York*.[20]

Although the *Pi Lambda Phi* case applied the test articulated in *Roberts* and *Duarte*, *Pi Lambda Phi* is distinguishable from those cases because the question before the court did not involve a challenge to the fraternity's membership practices. Instead,

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12 *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

13 *Id.* at 620.

14 *Id.*

15 *Id.* at 621.

16 *Id.*

17 *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1986).

18 *Id.* at 546-47.

19 229 F.3d 435 (3d Cir. 2000).

20 502 F.3d 136 (2nd Cir. 2007)

21 *Pi Lambda Phi*, 229 F.3d at 439-40.

the court considered if the University of Pittsburgh violated the fraternity's intimate associational rights by declining to recognize its local chapter. There, the university revoked the chapter's recognition based on a police raid of the chapter house.[21] After unsuccessfully pursuing university administrative procedures to reinstate the chapter, the fraternity filed suit against the university, alleging it was violating the chapter members' First Amendment associational rights.[22] The court found the chapter was "not the type of association that warrants constitutional protection as an intimate association."[23] Applying the *Roberts* test, the court found : (1) the chapter was "not a particularly small association," (2) the chapter was "not particularly selective in whom it admits," (3) the national organization "encourages its chapters to recruit new members aggressively so as to continue the growth of the organization," and (4) the chapter "invites members of the public into its house for social activities and participates in many public University events."[24]

In contrast, the court in *Chi Iota Colony* considered whether the application of a university non-discrimination policy infringed on the associational rights of members of a fraternal organization. There, a colony of Alpha Epsilon Phi Fraternity sued the College of Staten Island to challenge the college's refusal to recognize the colony because it discriminated on the basis of gender.[25] The court concluded the colony was not the type of intimate association entitled to constitutional protection for several reasons: (1) the colony "places no limit on membership size," (2) the colony's purposes were "broad, public-minded goals that do not depend for their promotion on close-knit bonds," and (3) the colony involved "non-members in several crucial aspects of its existence."[26]

That the courts in *Pi Lambda Phi* and *Chi Iota Colony* concluded the organizations in those cases were not entitled to constitutional protection as intimate associations does not mean there are no fraternal organizations that could meet the *Roberts* test. However, these cases demonstrate the *Roberts* test is extremely stringent, and the likelihood that any private organization, fraternal or otherwise, could satisfy the Roberts test is slim. Indeed, the Supreme Court has never concluded that a private organization of any kind satisfied the *Roberts* test.

EXPRESSIVE ASSOCIATION

The Supreme Court also recognizes "the right to engage in activities protected by the First Amendment implies a 'corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'"[27] A group is entitled to constitutional protection as an expressive association where it engages "in some form of expression, whether it be public or private."[28] The Supreme Court has held that an organization that "seeks to transmit . . . a system of values engages in expressive activity."[29] Forcing an organization engaged in expressive activity to "accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express."[30] Freedom of association, therefore, "plainly presupposes a freedom not to associate." *Id.*

In *Boy Scouts of America v. Dale*, the Supreme Court considered whether the forced inclusion of a gay Scoutmaster would infringe on the Boy Scouts' ability to express its views on homosexuality. Relying on portions of the Scout Oath and Law providing a Scout shall be "morally straight" and "clean,"[31] the court accepted the Boy Scouts' assertion that it intended to express the view that "engaging in homosexual conduct is contrary to being morally straight and clean." The court found requiring the Boy Scouts to accept an openly gay Scoutmaster would "interfere with the Boy [Scouts'] choice not to propound a point of view contrary to its beliefs."[32]

Whether an organization is engaged in expressive activity, however, is only the first part of the analysis. After concluding an organization is engaged in protected expressive activity, a court must look at whether the organization's right to engage in that

22 *Id.* at 440.

23 *Id.* at 441.

24 *Id.* at 442.

25 *Chi Iota Colony,* 502 F.3d at 138-39.

26 *Id.* at 144-47.

27 *Duarte*, 481 U.S. at 548 (quoting Roberts, 468 U.S. at 622)).

28 *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

29 *Id.* at 650.

30 *Id.* at 648.

31 *Id.* (internal quotation marks omitted).

32 *Id.* at 654.

protected expressive activity would be impermissibly infringed upon by government action. For example, in both *Roberts* and *Duarte*, the Supreme Court concluded the interest of the state in eliminating discrimination against women outweighed any infringement on the expressive associational rights of the Jaycees and Rotary Clubs because the ability of each group to express its preferred views would not be impeded by the inclusion of women.[33] Accordingly, if the values an organization seeks to transmit to its members are broad and general goals such as "humanitarian service," "high ethical standards," or "good will and peace," a court would likely find the inclusion of unwanted members would not burden the organization's expressive activity because it would not require the organization to "abandon or alter" any of its activities.[34]

What lessons should fraternal organizations glean from the Supreme Court's analysis of expressive associations? Although the Dale case seems antiquated today when the Boy Scouts accept openly gay Scouts and Scoutmasters, transgender Scouts, and girls, the case has not been overturned, and its analysis is instructive. The Boy Scouts took the position that it sought to instill the value that homosexual conduct was unacceptable, and to support its position, it pointed to its Oath, Law, and other written statements. The Supreme Court accepted this position and concluded the application of a public accommodation law to force the Boy Scouts to accept a gay Scoutmaster would impermissibly interfere with the Boy Scouts' expressive associational rights.

Like the Boy Scouts, private fraternal organizations transmit a system of values to their members and have the right to exclude individuals from membership if their inclusion would interfere with the expression of those values. Thus, the question for fraternal organizations is: can an organization justify or support its membership practices based on its written documents? Whether the fraternal organization is a women's organization or a men's organization, whether it is trans-inclusive or trans-exclusive, what could an organization point to in its ritual and governing documents to support its membership practices? Fraternal organizations should also consider whether their right to discriminate on the basis of sex would be impermissibly infringed upon by a government action. Accordingly, fraternal organizations should be able to not only clearly articulate their values but also why the inclusion of those not eligible for membership would interfere with an organization's ability to engage in "protected activities or to disseminate its preferred views."[35]

> The *Pi Lambda Phi* court also considered whether the fraternity chapter at issue was an "expressive association." The court concluded the university's action was not directed at and did not interfere with the chapter's expressive associational rights, if any. Although that case's discussion of expressive association is informative, it did not involve a question of whether the chapter would be forced to include a member it did not want. The only question before the court was whether the University of Pittsburgh was interfering with the expressive associational rights of the chapter and its members by declining to recognize the chapter. *Pi Lambda Phi*, *229* F.3d at 442-47.

CONCLUSION

In closing, this article aims to begin a larger conversation about how fraternal organizations define themselves. Fraternal organizations are not "single-sex" organizations. Fraternal organizations do not have a "single-sex exemption" under Title IX. Instead, fraternal organizations are private organizations, and as such, they retain the right to define who is and is not eligible for membership. As fraternal organizations are continuously encouraged

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33 *Duarte*, 481 U.S. at 549; *Roberts*, 468 U.S. at 627.

34 *Duarte*, 481 U.S. at 548.

35 *Roberts*, 468 U.S. at 627..

to reframe how they view themselves, organizations must think critically about their governing documents and membership practices:

- Does your organization clearly identify the values it seeks to transmit to members?
- Does your organization clearly articulate who may and may not become a member?
- Do your ritual and governing documents explain why the inclusion of those who are not eligible for membership would interfere with the expression of the organization's values?
- What changes could your fraternal organization make to strengthen its associational rights under the First Amendment?

These questions are difficult because they strike at the very core of what fraternities and sororities are as a community. Examining the values and principles upon which fraternal organizations were founded is critical for the purposes of analyzing First Amendment protections. As communities continue to grapple with serious issues such as hazing, sexual assault, and alcohol abuse, campuses and organizations should already be discussing ways they can redefine fraternities and sororities. A return to values and principles, therefore, can provide guidance and help strengthen and protect fraternities and sororities for future generations.

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WHAT COULD AN ORGANIZATION POINT TO IN ITS RITUAL AND GOVERNING DOCUMENTS TO SUPPORT ITS MEMBERSHIP PRACTICES?

THE CASE FOR CREATING COMMUNITIES FOR COLLEGIATE WOMEN

DANI WEATHERFORD

The first sorority was founded on a college campus more than 150 years ago, at a time when men overwhelmingly outnumbered their female peers. Sororities provided a foundation of support – often a place to live and a community with whom to associate – at a time when the college campus was less than welcoming.

Without question, women have largely persevered. College enrollment among women now tops men, as do graduation rates. Yet, it would be a fundamental mistake to presume this progress suggests there is no longer a role for women's groups on campuses. The makeup of current college campuses does not mean that women do not still need their own space. Spaces that allow women to support each other, encourage each other, and advocate for each other are still needed to allow for continued growth and success for women.

For instance, women are still underrepresented in STEM careers, the U.S. Congress, and among the ranks of corporate executives. Both the American Association of University Women (AAUW) and Institute for Women's Policy Research — who compared the salaries of women and men who worked full time, year-round in all career fields — found in 2016 women made only 80 cents for every dollar earned by men, a gender wage gap of 20 percent. And, at the current rate, it will not be until 2059 that women finally reach equal pay. It is important to note these figures compare women in aggregate. When analyzing earnings and race, women of color are paid significantly less than white women.

In addition, according to the Campus Sexual Violence Statistics provided by the Rape, Abuse & Incest National Network (RAINN), women between the ages of 18-24 have a greater risk of experiencing sexual violence. In fact, 23.1 percent of undergraduate women and 8.8 percent of graduate student women experienced sexual assault by physical force, violence, or incapacitation. Based on these most recent findings, one out of every six women has been a victim of sexual violence and among undergraduate women that number is one in four. This reality is highlighted by the battle against sexual violence on campus and the #metoo movement.

Amidst these and other remaining challenges, the question continues to linger: Are women's only sororities still relevant? The answer is a resounding "YES."

On campus, members of sororities are more likely to report being emotionally supported — directly related to the relationships developed when women have an opportunity to create their own communities. Perhaps because of these communities, sorority women report more robust engagement in campus organizations and extracurricular activities, which are increasingly recognized as critical elements of the total student development experience. Then, after graduation, sorority members are also more likely to report having a sense of purpose and to believe their undergraduate experience prepared them well for life after college.

Additionally, while sorority membership is often tied to higher levels of community service overall, it is critical to note these women's organizations are increasingly focusing their efforts on advocating for some of the most pressing issues facing women today. They are supporting victims of sexual assault, leading bystander intervention programs, fighting for body-positive campus cultures, advancing educational opportunities, and more.

Membership in sororities can create foundational experiences for women. In 2016, when Harvard announced their policy on single-gender organizations, NPC noted, "Sorority membership calls on women to empower each other and provides powerful spaces of support, something as important today as it has ever been." As such, faced with the uncertain future of her own chapter's future on Harvard's campus, then-senior Whitney Anderson remarked, "Joining a women's organization helped me find my place … I finally had a home at school." She added that her sorority was "where I became a feminist, and where I re-found my voice."

We owe it to women like Whitney to create spaces and communities where they can, and do, find their voices. Doing so is as important today as it was more than a century ago.

AUTHOR

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Dani Weatherford became an initiated member of Delta Gamma in 1998 while attending DePauw University. Ever since, she has been an active member, mentor, and steadfast promoter of the sorority experience.

ADVOCATING FOR THE FRATERNITY EXPERIENCE

PATRICK JESSEE, J.D., CAE

When students arrive to college, they have hundreds of opportunities to get engaged on campus. Almost all student organizations offer a co-edified experience, yet every year nearly 1 million students purposefully seek out the opportunity to foster deeper connections and development among peers of their own identified gender by joining men's fraternities and women's fraternities/sororities.

They are looking for something different — I'd argue something special — not readily found in co-ed student involvement opportunities. My own fraternity story reflects this reality, as do the stories of many undergraduate men I meet across the country.

My childhood was difficult. Growing up in poverty, I often wondered where my next meal was coming from. I lost my loving mother to a heart-attack at 13 years old, and I regularly suffered at the hands of my abusive father. Walking onto a college campus as a student, given my background, was a blessing for me. Still, even that blessing was shared with continued struggles. I battled depression and suicidal thoughts throughout college as I continued to cope with my past. Fortunately, I had an important source of growth and support to help me through. My fraternity was my family, and my brothers were shoulders to lean on in tough times. Without the bond, the support, and the brotherhood I had through fraternity, I am not sure I would have survived my time in college. Nor would I have had a group I identified with and trusted. As any college student does, I made juvenile decisions and mistakes along the way as well. In those moments, I had strong peer role models and adult mentors that gave me the immediate social feedback I needed as I learned to be a healthy adult man.

Now, when I visit chapters and meet brothers, I hear this echoed by undergraduate men every day. It is shocking how many men are coming to college longing for positive male influences, and a sense of brotherhood they have been missing in their lives. They share powerful stories about support received through experiences such as troubling emotional trials, feeling not only safe but emboldened by their brothers as they came out as gay, and navigating self-reflection, growth and personal development.

Fraternity is valuable, in part, specifically because it offers a space for men to learn and grow in a space with other men. We rightfully worry about concerning behavior that happens in certain chapters, and we absolutely need to correct that behavior. However, we should also recognize the unique value that can come from a brotherhood of men collectively navigating the challenges of college and beyond.

At a time when positives strides are being made to ensure a more welcoming and inclusive environment for students on campus, there is an urge to be suspicious of things that do not align with an ideal of complete inclusivity. Thus, some will question whether fraternities and sororities should continue to exist as women's and men's organizations. There is a natural conflict that exists between inclusivity and selectivity. Organizations that are, in their very nature, exclusive in some sense (such as fraternities and sororities, sports teams, merit and honorary societies, performance groups, and cultural clubs) exist within this tension.

For some, the answer to this conflict is to remove the exclusive component by co-edifying fraternities and sororities. Others suggest preserving only sororities as single-sex organizations to empower women. While I strongly support inclusivity, I do not agree with the urge to have it swallow the uniqueness of the single-sex fraternity and sorority experience. We live in a beautifully complex society that necessitates cognitive dissonance and nuance. Uniform application of any ideal without respect to this complexity is typically achieved at the cost of undermining another significant and critical value.

The single-sex experience fraternal organizations offer has distinct value. Various academic articles and opinion pieces tout positive outcomes ranging from elevated academic engagement and graduation rates to professional well-being and civic engagement. However, there is notably less literature that discusses the needs of young men in today's society, and how the fraternity experience provides a critical support system. I am aware of the risk I take as a white man speaking about how men today are struggling and how inclusivity should mold around the existing structures of men's fraternities, but I pose this is an important topic that requires a nuanced and thoughtful dialogue.

Research shows young men are, in fact, struggling — struggling with serious issues from mental health to academic success — in different ways than women. A May 2018 Cigna study reported that the current population of 18 to 22 year-olds is the "loneliest generation," lacking people who "really understand them" or who they "feel close to." A 2016 study showed the stress of first-year students in fact stems from loneliness. Further research shows that by adulthood, many men have lost the "deeply fulfilling" connections they once experienced with male friends, and this continues to taper throughout their lives. Some call this loss an "epidemic of male loneliness."

Loneliness can have serious impacts on physical health, future career success, and mental well-being. In fact, young men are startlingly four times as likely to commit suicide as young women. Addressing this issue of male-loneliness and depression cannot be overlooked or set to the side. Yet, psychologists say that improving social skills, enhancing social support, increasing opportunities for interaction and connection, and

engaging in bonding activities for men are all ways to combat it. All are benefits fraternities offer today's college student.

Additionally, in a society that places a heavy value on the need for a college degree, men are not reaching the finish line nearly as often as women. Currently, 25 percent fewer men graduate from college than women. It is incredible and worth celebrating that women today are more likely than ever to obtain a college education, and there is undoubtedly plenty of room to continue improving equity for women in education and the workplace. Yet, as we celebrate and continue pushing for equity for women, we cannot ignore a disturbing trend for men. Fraternities provide significant benefits in helping men reach the finish line. Members report significantly higher levels of academic engagement, greater graduation rates, and on many campuses, GPAs above the all-men's average.

Finally, we cannot overlook the need for healthy bonding among college men coupled with strong, positive, male influences. There is extensive literature and dialogue around toxic masculinity. Whether or not you agree with the concept of masculinity itself being toxic, there is no doubt there are healthy and unhealthy, and productive and unproductive ways to interact as men in society. Young men in college — who are still developing, learning and adapting — take queues and model behavior from the world around them as they choose between those two ends of interaction. Moreover, men are coming to the college environment from a background that is not always built on a foundation with consistent and positive male influences in their family. There is obviously a need to provide young men with healthy examples of masculine identity, and there are potentially destructive consequences when young men are not able to find such.

Are fraternities the answer to solve these issues? No. Complex issues like these require nuanced and multi-faceted solutions. However, a positive, healthy fraternity experience where genuine connection and friendship is fostered is absolutely a source of positive influence that can be a part of the answer.

The fraternity experience provides a unique outlet for students to create a sense of family and bonding. Additionally, it can make the campus environment less lonely. In contrast to other co-ed clubs, activities and organizations, it also provides a space for men to develop and grow in a space with other men; something that can have a unique and meaningfully positive impact on the issues college men are struggling with today. The incredible bonding within a fraternity and the security that accompanies a space where men can interact, grow, talk, and even fail, can bring about a great opportunity for vulnerability, honest dialogue and peer enacted behavior correction. This provides a safety net for men in the chapter struggling with tough issues like loneliness, depression, and self-doubt. When the experience is supported by adult advisors, the positive environment is only amplified. This is further bolstered by the new member, member development, and mental health education provided through the connection between a chapter and its inter/national fraternities.

I believe conversations about the reality women face in our society and about the support our men need are not mutually exclusive. Having a space designed to afford me, and others like me, the opportunity for male development and growth does not negate the opportunity to support inclusivity. Perhaps not every man in college needs a venue to connect with, and learn from other men, but I did. My fraternity experience was pivotal in helping me to discover who I am, where I fit within society, and how I can contribute to society in a positive way. The answers here are not easy. We should celebrate the realities of our complex world and have honest conversations about the complicated issues in front of us.

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NEW LIABILITY FOR SEXUAL-BASED HAZING

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In a federal-court lawsuit filed in January 2011, a male alumnus of the University of California, Davis alleged that, while he was pledging the campus chapter of Alpha Epsilon Pi fraternity, brothers made him drink excessive amounts of alcohol, drugged him, and sexually assaulted him, including pulling off his clothing and touching his penis without his consent (*Clifford*, 2012). He brought his lawsuit primarily under Title IX of the Education Amendments of 1972, claiming that the sex-based hazing he suffered by the fraternity brothers' conduct constituted sex-based discrimination which Title IX prohibits. Because the plaintiff filed his lawsuit beyond the statute of limitations period, the trial court dismissed his complaint without ever evaluating the issue (*Clifford*). To date, *Clifford* is the only searchable case involving sex-based hazing, let alone same-sex, sex-based hazing.

We are not observing a dearth of cases in the college fraternity context because same-sex, sex-based hazing is particularly rare. The ubiquity of same-sex, sex-based hazing in other arenas strongly suggest otherwise. Reports of same-sex, sex-based hazing proliferate among high-school athletic teams (*Cestone & Belstock*, 2017; *Cook*, 2016; *Frank*, 2017; *Rainwater*, 2016), college sports teams (*Axson*, 2017), and college bands (*Pérez-Peña*, 2014). Additionally, we know that nearly half of persons hazed in college were also hazed in high school, and that hazing behaviors that begin in childhood are not likely to decrease — but rather increase — in college (*Alfred University*, 2001). We also know that hazing and sexual assaults are both severely underreported at the present moment, and are the targets of increased state and federal efforts to improve their reporting and provide services for survivors (see, e.g., Fla. Stat. Ann. § 1006.63, 2007; SaVE Act, 2013). With this in mind, the dramatic rise of high school hazing raises an increasing likelihood that a *Clifford*-like scenario will soon impact colleges and fraternities and sororities. In this article, we show how three distinct legal events are converging alongside a rise in same-sex, sex-based hazing which would create a "perfect storm" that would allow a Title IX sex-based discrimination claim to avoid the common-law bystander and absence-of-control defenses that typically shield colleges and inter/national fraternal organizations, respectively, from liability for hazing and sexual assaults committed by fraternity and, to a lesser extent, sorority members.

Case-law Shifts in College Liability for Fraternity Hazing

Since the demise of the in *loco parentis* doctrine in the 1960s (*Dixon*, 1961), colleges and inter/national fraternal organizations have largely evaded liability for hazing- and sexual-misconduct-related harms caused by student fraternity members (see, *e.g.*, *Campbell*, 1986). Neither colleges nor inter/national organizations are generally believed to exert sufficient control over the day-to-day activities of student fraternity members such that they can be held liable for their actions. Colleges are typically construed as landlords who, like other landlords, cannot insure against tenants' private social moments (*Rocha*, 1992). Whether hazing or rape occurs behind rented premises, colleges do not owe a special duty to protect invited guests from the tenants who invited them (see *Tanja H*, 1991).

A key exception to this rule can be found in the case *Furek* (1991). In *Furek*, the bystander rule did not shield the university from liability when students pledging the campus's Sigma Phi Epsilon chapter had been observed marching carrying paddles and had been stopped on campus grounds by university security officers while identically dressed in dark clothes. Importantly, the university's repeated communications of its anti-hazing policy alone were insufficient to assign duty to hold it liable for failing to protect the plaintiff from hazing-related harm. The tandem — assumption of duty and ability, but failure to control — led the Delaware court to hold the university liable.

Case-law Shifts in Inter/national Fraternal Organization Liability for Local Chapter Hazing

Similarly, inter/national fraternal organizations also avoid liability in circumstances where they do not exercise control over membership intake, even when they prescribe specific membership intake protocols (see *Bogenberger*, 2016). Paradoxically, inter/national organizations are liable when their protocols allow chapters discretion to add chapter-specific intake requirements (e.g., *Ballou*, 1986) or when they assume substantial control over membership intake — and thereafter fail to prevent hazing. Compare the cases *Walker v. Phi Beta Sigma* (1997) and *Morrison v. Kappa Alpha Psi* (1997). *Walker* and *Morrison* both involve candidates for initiation to NPHC-member BGLOs, and both were decided under Louisiana law. Though

both Phi Beta Sigma and Kappa Alpha Psi had put into place fairly extensive anti-hazing regulations and procedures which shifted membership intake from chapters to arms of the national organization, trial testimony in *Morrison* confirmed a rigid hierarchy under which all Kappa Alpha Psi brothers, chapters, local, and regional officers are supervised, audited, and disciplined by the national organization. Thus, the courts were able to establish that Kappa Alpha Psi has an ability to control – and therefore prevent – hazing in ways that they are typically unwilling to find with respect to national fraternal organizations. This fact, together with evidence that Kappa Alpha Psi knew of prior hazing incidents at the Louisiana Tech University chapter through which the plaintiff was attempting to join the fraternity, met a standard similar to *Furek*, and allowed the court to impose liability on the national fraternal organization.

Liability for Sexual Misconduct

Under a *Furek/Morrison* standard, it is virtually impossible to assign liability either to a college or a national fraternal organization for sexual misconduct, primarily because sexual misconduct tends to occur behind closed doors in private locations and is underreported. These features directly contributed to the plaintiff in *Tanja H* losing her case against the University of California, Berkeley for failing to protect her from being raped by multiple students. A similar case, *Williams* (2007) involved *Furek/Morrison*-type facts: the university was aware of one of a plaintiff's assailant's history of sexual misconduct when it admitted him. But that feature alone would not be sufficient to shift away from a *Tanja H*-type outcome. In *Williams*, the Eleventh Circuit Court of Appeals found that the University of Georgia showed "deliberate indifference" to the plaintiff both when it admitted an assailant with knowledge of his history and when it did not discipline any of her assailants after she reported her rape. As an "educational program or activity receiving Federal assistance," the University of Georgia has an obligation to prevent any student "on the basis of sex [from] be[ing] subject to discrimination" (20 U.S.C. § 1681(a)). After the appellate court allowed the plaintiff's case to proceed to trial, the university settled for an undisclosed amount.

Despite *Williams*, maintaining a Title IX sexual-misconduct-as-sex-based-discrimination claim was fleeting (see, *e.g.*, *Ross*, 2017) until the Department of Education issued an April 4, 2011 "Dear Colleague Letter" (DCL). When a school or college/university "knows or reasonably should know about student-on-student harassment that creates a hostile environment," it must "take immediate action to eliminate the harassment, prevent its recurrence, and address its effects" (p. 4). The DCL explicitly states that colleges/universities cannot avoid their responsibilities to investigate allegations of sexual misconduct by delegation, and requires colleges to investigate allegations independently of law enforcement. Further, the DCL both reduces the standard for resolving complaints from the "clear and convincing" standard of high probability to the "preponderance of the evidence" standard of more likely than not. Importantly, for the first time in Title IX guidance, the DCL includes male victims of sexual misconduct as requiring prompt university redress.

Convergence

Though many DCLs and administrative guidance are currently being reviewed with the change in administrations, the provisions of the April 4 DCL were codified when Congress passed the Campus Sexual Violence and Elimination (SaVE) Act of 2013. Failure to comply with the SaVE Act provisions on sexual-assault prevention and survivor support threatens loss of federal funding. Increased enforcement of Title IX and the enactment of SaVE have led many colleges and universities to establish or improve women's centers, LGBTQ centers and support networks, and sexual-assault survivor programs (see Griffin, 2017). Some colleges might contemplate ending their relationships with single-sex social fraternities and sororities. One notable institution, Harvard University, has promulgated a policy designed to discourage any student from participating in un-recognized single-sex social organizations (Harvard College, 2016) based in large part on its March 7, 2016 report finding, in part, that male-only finals clubs (unrecognized fraternities) "are the single most likely location for a student to experience sexual assault" (Harvard University Task Force, 2016, 11). Though, obviously not considered by Harvard when it issued its report and action, Griffin (2017) finds that a mere 11 percent of institutions are currently in compliance with Title IX and SaVE — and institutions with football teams and fraternity/sorority life are substantially less in compliance.

Revisiting *Clifford*

These data are alarming to colleges and universities that, due to Title IX and SaVE, now have a stronger affirmative duty to prevent sex-based harms and to protect their students from the same. With this in mind, let us revisit *Clifford* and what might have happened had this case survived dismissal. At common law, unless there was evidence that the plaintiff had been sexually hazed on public campus grounds or on a location where campus authorities might have been able to control the events by preventing their occurrence, the *Furek* exception to the bystander defense would probably protect a college from state-law claims. A common-law, absence-of-control defense might also protect an inter/national fraternal organization from state-law claims unless a plaintiff could prove centralized control over membership intake and education processes as in *Morrison*. While a *Tanja H* scenario involving sexual assault of an invited guest might be easier for an inter/national fraternal organization to defend because of the law's assumption of non-control over individual members' sexual conduct or misconduct, when a sexual assault takes place as part of membership intake processes over which they do control, civil liability becomes harder for them to avoid.

State laws notwithstanding a student who experiences sex-based hazing is more easily able to establish special duties on the parts of the college/university and the fraternity to prevent the harm. He also has a private right to sue for Title IX violations (*Cannon*, 1979), and may recover for "deliberate indifference" on the part of the college/university in oversight of both the fraternity and its members if the same substantially harms his educational experience (*Williams*, 2009). Possible recovery scenarios include sex-based hazing occurring after a fraternity has been made aware of similar previous conduct by persons or chapters who might play a role in future membership intakes or when colleges/universities have been made aware of similar previous conduct in campus chapters. To prevent sexual hazing from occurring, many colleges/universities are demanding inter/national fraternal organizations conduct stronger membership education and prevention programs on sexual assault — broadly defined to include same-sex sexual assault. They are also stepping up risk management requirements on student organizations, particularly those who maintain housing on or off campus. In light of these efforts, a college/university that is found liable for sex-based discrimination in the form of sex-based hazing might pursue indemnification from the inter/national fraternal organization associated with the campus chapter. Even were it unsuccessful, a college/university could respond by banning said campus chapter and fraternal organization from campus both as an exercise of academic freedom and safety. With this in mind, colleges/universities, campus fraternity and sorority chapters, and inter/national fraternal organizations should adjust their risk management procedures on hazing and sexual assault.

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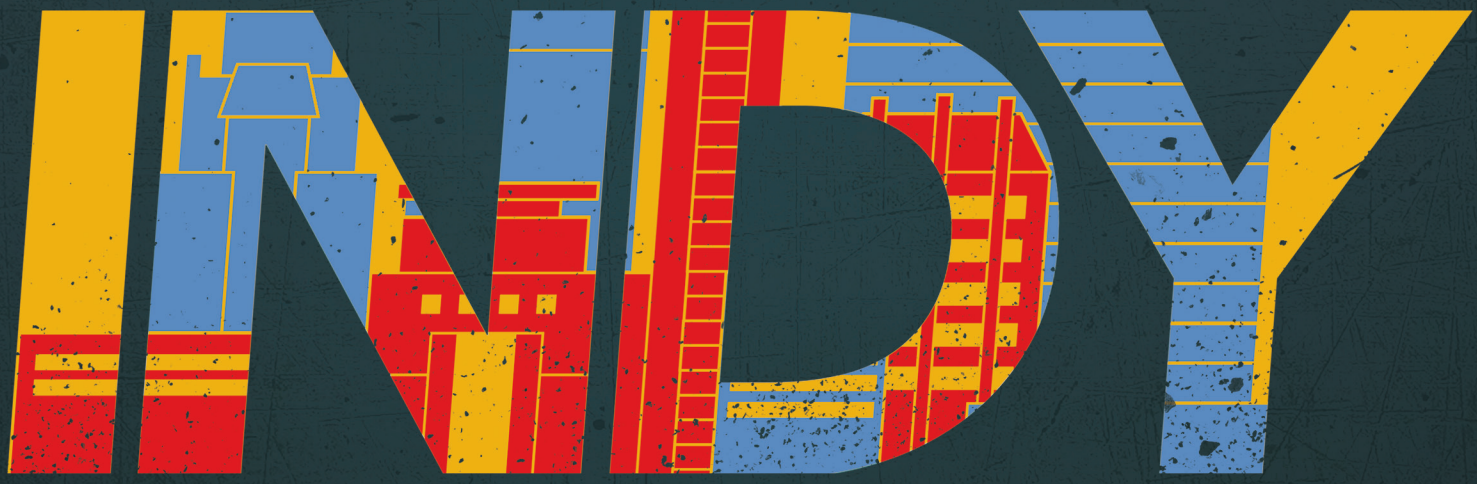

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